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No. 03-520

In The

Supreme Court of the United States

CHERYL PLILER, Warden of
California State Prison, Sacramento,

Petitioner,

v.

JOSEPH HUNT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Joseph Hunt, through his attorney Eric S. Multhaup, opposes the petition for writ of certiorari filed on behalf of Cheryl K. Pliler, Warden of California State Prison – Sacramento, by the Attorney General for the State of California (hereinafter "the State") for the following reasons.

STATEMENT OF THE CASE

Respondent generally concurs in the Statement of the Case contained in the Petition, pp. 4-8. Respondent will set forth any additional procedural or factual matters as necessary to support his argument, below.

REASONS FOR DENYING THE PETITION

The State proffers six reasons for granting the petition, which respondent addresses in turn.

I. THE PANEL OPINION DOES NOT CONFLICT WITH THE SPIRIT OR LETTER OF *ROSE V. LUNDY*.

The State has contrived a non-existent conflict between *Rose v. Lundy*, 455 U.S. 509 (1981) and the panel opinion in this case in an effort to villainize the stay and abeyance procedure adopted by the Ninth Circuit in this and other cases. The State's position relies almost entirely on certain language taken out of context from the panel opinion, and is repudiated by a fair reading of the overall

opinion and its precedent in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003). The State quotes one excerpt from the panel opinion that "Ninth Circuit authority 'contemplate[s] that district courts may stay and abey a mixed petition, permitting petitioner to return to state court and exhaust unexhausted claims' ", Petition, p. 8, quoting from App. A-15. The State implies that the Ninth Circuit contemplates that the *mixed* petition be stayed *in its entirety*, both exhausted and unexhausted claims, with the unexhausted claims moldering and festering in district court for some indeterminate period while the petitioner attempts to exhaust them in state court. The State complains that the retention of stayed but unexhausted claims conflicts with *Rose v. Lundy*.

The Ninth Circuit has *never* intended in this or any other case that the *un*exhausted claims be *retained* in district court while the petition pursued state remedies. To the contrary, by any fair reading of the panel opinion in this case and in *Ford*, the procedure requires that the unexhausted claims be *withdrawn* from the federal petition during the exhaustion process, so that the only document pending in federal court is a pristine petition comprised solely of exhausted claims. The Ninth Circuit characterized the district court's error in a manner that conveys with crystal clarity that the stay and abeyance procedure does *not* contemplate the retention of a mixed petition in district court:

> "Because the district court, in dismissing the First Amended Petition, acted on the premise that all claims had to have been exhausted at the time the petition was filed, it did not advise Hunt that he had the option to stay his First Amended Petition *after dismissal of unexhausted claims* to

> permit him to exhaust those claims and then add them by amendment to his stayed petition, as it was obliged to do." App. A-16 (emphasis supplied).

Clearly, the Ninth Circuit contemplated that the *un*exhausted claims would be surgically removed from the petition so that only exhausted claims remained pending in the district court, such that the petition could not be characterized as "mixed" and its pendency would not violate *Rose v. Lundy* or any of this Court's successive cases.

The State recognizes that the procedure approved by the panel does *not* contemplate the retention of a mixed petition in federal court, but only in its second argument, in which it correctly describes the Ninth Circuit as approving "a 'stay and abeyance' procedure whereby a mixed petition may be filed, *unexhausted claims dismissed*, and a stay of proceedings obtained for the purpose of exhausting the dismissed claims in state court", Petition, p. 10 (emphasis supplied). The State does not and cannot argue that the stay and abeyance procedure violates *Rose* where the procedure requires dismissal not retention of the unexhausted claims.

The State also quotes snippets from *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), *Castille v. Peoples*, 489 U.S. 346, 349 (1989), and *Engle v. Isaac*, 456 U.S. 107, 124 n. 25 (1982) purporting to reiterate the *Rose* requirement that a mixed petition must be dismissed, Petition, pp. 9-10. However, nothing in those cases suggests that a petition from which unexhausted claims have been *removed* is nonetheless permanently tainted by the *former* presence of the unexhausted claims so as to require dismissal. *Coleman* did not involve any exhaustion issues

whatsoever, but merely referred to exhaustion jurisprudence in addressing a related topic of procedural default in state court as a bar to federal review. *Castille* simply held that the presentation of a claim to the Pennsylvania Supreme Court via a procedure for discretionary review analogous to California's pretrial writ procedure did *not* exhaust that claim for federal habeas corpus purposes. In *Engle*, this Court declared its "reluctan[ce] to interpolate an unexhausted claim not directly presented by the petition", because "*Rose v. Lundy* does not compel such harsh treatment of habeas petitions." 456 U.S. at 124, n. 25. None of these cases is remotely relevant to the determination of whether a petition that has been surgically stripped of unexhausted claims may be held in abeyance.

Nor is *Duncan v. Walker*, 533 U.S. 167 (2001), in which this Court held that the filing of a *federal* habeas corpus petition that was subsequently dismissed without prejudice did *not* toll the one year statute of limitations for purposes of calculating the timeliness of a second federal habeas corpus petition. There were no exhaustion issues raised in that case, although this Court did discuss some of the policies underlying the exhaustion requirement. In sum, the State's effort to persuade this Court that the Ninth Circuit stay and abeyance procedure somehow conflicts with *Rose* and it progeny is patently contrived. There is no reason for this Court to grant certiorari to resolve a fictitious problem contrived by a party.

II. THE STAY AND ABEYANCE PROCEDURE DOES NOT CONFLICT WITH THE AEDPA STATUTE OF LIMITATIONS.

In this section, the State claims that the stay and abeyance procedure would nefariously "eviscerate the AEDPA's

limitation period, and reduce district courts to a 'jurisdictional parking lot'", Petition at 10-11, quoting *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995). The State confuses the concept of tolling the statute of limitations with the concept of complying with the statute of limitations. The filing of a state petition prior to the expiration of the federal statute of limitation tolls it; the filing of a federal petition prior to the expiration of the statute of limitations complies constitutes compliance as to the claims contained in the petition. Regardless of how long it takes for those claims to reach a merits adjudication in federal court, they do not lose their statute of limitations compliance rating regardless of whether they remain continuously pending in federal court or are subject to a temporary dismissal followed by a re-insertion through dismissal, amendment, and relation back. There is no issue of tolling here; rather, it is a matter of compliance.

Sterling does not support the State's argument that the stay and abeyance procedure violates any aspect of this Court's jurisprudence. *Sterling* simply addressed the question of "whether an indigent state death row petitioner, who has failed to exhaust state remedies, may secure federally appointed and paid counsel to exhaust state remedies." 57 F.3d at 452-453. *Sterling* noted in passing that the district court correctly refused to stay an unabashedly *mixed* petition in federal court while the federally appointed attorney attempted to exhaust the unexhausted claims in state court. Neither the panel in this case nor the Ninth Circuit at large has ever espoused the staying of a *mixed* petition while the unexhausted portion of the mixed petition was being exhausted. None of the State's authorities establish any infirmity with the

stay and abeyance procedure, either regarding the statute of limitations or any other provision of the AEDPA.

III. THE RELATION BACK DOCTRINE OF RULE 15(c) IS CONSISTENT WITH FEDERAL HABEAS CORPUS LAW.

The State's argument regarding the inapplicability of the relation back doctrine of Rule 15(c), Fed. R. Civ. Proc., is frivolous. The State correctly notes that "Rule 15(c) applies only to proceedings that are governed by a statute of limitations", Petition, p. 12, but then notes that Rule 15(c) when enacted did not govern federal habeas corpus proceedings because there was no habeas statute of limitations then in existence. If the State is arguing that 15(c) is applicable only to statutes of limitations that were in existence at the time of the enactment of Rule 15(c), the State is being silly. If the State is arguing that the Rule 15(c) relation back doctrine should not be generally applicable to federal habeas proceedings for policy reasons, the State has completely failed to advance any such reasons.

The clear need for a relation back doctrine in federal habeas proceedings is clearly demonstrated by this case, in that respondent has *always* claimed that the claims deemed *un*exhausted by the district court *had* in fact been exhausted in the state court. The district court disagreed, and respondent had a tactical choice to make that was fraught with peril under the State's view of the relation back law. On one hand, respondent understood that the issue of exhaustion "will often prove difficult to determine", *Barresi v. Maloney*, 296 F.3d 48, 56 (1st Cir. 2003) [reversing district court for erroneous determination that claims had not been exhausted]. Respondent thus had the

option of appealing the dismissal, which he did, but which has so far consumed some two and a half years of time. Alternatively, had the stay and abeyance procedure been available with the relation back doctrine intact, respondent could have foregone the lengthy appeal, agreed to disagree with the district court as to exhaustion, and return to state court to obtain an undisputable ruling as to exhaustion within a period of *months* rather than *years*.

However, that clearly streamlined procedure was viable only insofar as the relation back doctrine was available; otherwise the State would attempt to trap respondent with a statute of limitations objection after respondent returned to federal court from the state exhaustion proceedings. The State offers no colorable reason why the expeditious stay and abeyance procedure should be functionally eliminated by the abrogation of the relation back doctrine. No sane habeas corpus petitioner would ever voluntarily dismiss an arguably exhausted claim in order to seek definitive resolution from the state court in the absence of a relation back doctrine because voluntary dismissal would be the functional equivalent of statute of limitations-assisted suicide.

IV. THE PANEL DECISION IS CONSISTENT WITH THE FIFTH AND EIGHTH CIRCUIT CASES CITED BY PETITIONER.

The State argues that "the panel's holding in that regard [the propriety of the stay and abeyance procedure] also conflicts with the decisions of at least two other circuit courts of appeal". Petition, p. 13. This argument provides no basis for granting certiorari for several reasons.

First, even assuming that Ninth Circuit procedure is different from or even in conflict with procedure from other circuits, there may be entirely practical reasons why such procedures could and should vary among the circuits of the country. Obviously, the exhaustion procedures *within* each of the 50 states vary considerably, and it is entirely possible that a federal court's response to a difficult exhaustion question could reasonably vary from region to region, and evolve over time.[1] So long as the federal court's response does not violate any provision of the AEDPA or any of this Court's jurisprudence, the mere fact of regional variation in exhaustion procedures provides no basis for this Court to grant certiorari.

Moreover, there is no conflict between the cases cited. All of the purportedly conflicting cases cited by the State involve the issue of whether a district court may stay a *mixed* federal petition that contains both exhausted *and* unexhausted claims for the period that the petitioner spends back in state court attempting to exhaust the unexhausted claims. *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) reversed an order by a district court staying a mixed petition in a capital case to permit the petitioner to exhaust the unexhausted claims – "We conclude

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[1] In this regard, the California Supreme Court has just restructured its procedures for conducting review of federal constitutional claims for purposes of exhausting state remedies. Effective January 1, 2004, new rule 33.3, Cal. Rules of Court, provides for a "petition for review to exhaust state remedies", which dispenses with the otherwise applicable requirements for a petition for review, and requires only a "brief statement of the factual and legal bases of the claim". Had this rule been in effect at the time of respondent's filings in the California Supreme Court, the district court could only have found that *all* claims in the First Amended Petition were duly exhausted.

that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition *including both exhausted and unexhausted claims* pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*" (emphasis supplied).

Respondent concurs that the procedure condemned in *Victor* violated *Rose*, but that is not the procedure endorsed by the Ninth Circuit. See part I, supra. More recently, the Eighth Circuit in *Akins v. Kenney*, 341 F.3d 681, 686 (8th Cir. 2003) essentially recognized and approved the procedure adopted by the Ninth Circuit. Akins argued on appeal that the district court had erred in dismissing his petition in its entirety because of the presence of some unexhausted claims, and that the district court "should have given him an opportunity to amend his petition to delete the unexhausted claims and allow him to proceed with the exhausted claims rather than face a complete dismissal, and thereby avoid the statute of limitations problem on the exhausted claims". Ibid. The Eighth Circuit reversed that portion of the district court decision and remanded with directions to proceed on the exhausted claims, but did not address the issue of whether the district court should consider a request to stay proceedings on the exhausted claims pending resolution of the unexhausted claims.

Similarly, the State's citation to Fifth Circuit cases is equally distinguishable, because the offending petition in *Sterling*, supra, "contain[ed] both exhausted and unexhausted claims", 57 F.3d at 451. The purported conflict is illusory, and the falsity of this illusion is clearly explained in *Zarvela v. Artuz*, 254 F.3d 374, 380 (2nd Cir. 2001) [cited by the State for a different proposition]:

> "Like the Seventh and Ninth Circuits, we think that the enactment of AEDPA warrants some adjustment in the pre-AEDPA requirement of *Rose v. Lundy* that mixed petitions be dismissed in their entirety. What the Supreme Court wanted to achieve, and what AEDPA reenforces, see 28 U.S.C. § 2254 (b)(1)(A), is the assurance that a district court will not grant relief on unexhausted claims. *That requirement of Lundy can be met by dismissing only the unexhausted claims.* As to the exhausted claims, we think a district court should exercise discretion either to stay further proceedings on the remaining portion of the petition or to dismiss the petition in its entirety. In many cases, a stay will be preferable." (Emphasis supplied)

Thus, there is no reason to grant certiorari to address the State's contrived characterization of a conflict between circuits for the two reasons that no conflict exists, and if it did, regional differences in addressing non-constitutional matters of criminal or habeas procedure are often to be encouraged rather than squelched.

V. THE SALUTARY ADVISEMENT TO PRO SE PETITIONERS ADOPTED BY THE PANEL REGARDING THE STATUTE OF LIMITATIONS PROMOTES A RESPECT FOR THE CONSTITUTION AND FOR THE GREAT WRIT.

The State argues that "no court (other than the Ninth Circuit) has ever held that a district court must advise a habeas petitioner that his federal claims may be time-barred, absent any equitable tolling, if he chooses to

dismiss a mixed petition and return to state court to exhaust his newly-presented claims", Petition, p. 15.[2] The State makes no claim that this advisement is in any way *wrong*, or *inaccurate*, or *seditious*. The implied criticism is that courts should not be in the business of giving habeas petitioners accurate information about the legal consequences of alternative courses of action.

Of course, federal courts *are* in the business of giving criminal defendants accurate information about the consequences of various choices, e.g., the consequences of guilty pleas. Indeed, in the specific context of habeas corpus proceedings, this Court recently concluded with respect to district court re-characterizations of miscellaneous motions as section 2255 petitions that federal courts must "warn the litigant that this re-characterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has". *Castro v. United States*, ___ U.S. ___, 72 U.S. L.W. 4105 (December 15, 2003).

This Court's justification for the warning regarding the implications of re-characterization is that it "can have

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[2] The panel opinion did not find that the district court erred in failing to advise respondent about the statute of limitations pitfalls potentially related to the dismissal of claims from the federal petition for state exhaustion purposes, so this is not an actual issue in this case. The panel found that the district court had committed the greater error in failing to advise respondent of the option to dismiss unexhausted claims and stay the exhausted claims. The statute of limitations advisement was an issue in *Ford*, and appears to have been carried over to the State's petition in this case.

serious consequences for the prisoner", ibid., just as serious as those that may accrue to a petitioner who is considering the dismissal of some or all of his claims as a step in the exhaustion process. The State does not argue that dismissal of some or all claims as part of an exhaustion procedure is *devoid* of any potentially serious consequences such that the warning is superfluous; in fact the State has no argument at all that the warnings promote anything but the interests of justice.

VI. THE SALUTARY ADVISEMENT ADOPTED BY THE PANEL DOES NOT CONFLICT WITH THE SECOND CIRCUIT'S RESOLUTION OF A RULE 60 MOTION.

Finally, the State conjures up another non-existent conflict between the *Ford* duty to advise of statute of limitations issues arising from dismissal of claims and *Warren v. Garvin*, 219 F.3d 111, 114 (2nd Cir. 2000), but this provides no basis for granting certiorari in this case because (1) the panel here did not adjudicate any claim of failure to advise on statute of limitations consequences of voluntary dismissal, and (2) *Warren* contains mere dicta relating to the petitioner's failure to abide by the one year statute of limitations of Rule 60(b), Fed. R. Civ. Proc., not the AEDPA statute of limitations.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court deny the petition for writ of certiorari.

Dated:

Respectfully submitted,

ERIC S. MULTHAUP
Attorney for Respondent
Joseph Hunt